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Supreme Court of the United States

No. 779

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

PHILIP L. GERHARDT,
Respondent.

No. 780

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

BILLINGS WILSON,
Respondent.

No. 781

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

JOHN J. MULCAHY,
Respondent.

MEMORANDUM IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JULIUS HENRY COHEN,
Attorney for Respondents.

On the memorandum:
AUSTIN J. TOBIN,
DANIEL B. GOLDBERG.

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MEMORANDUM IN OPPOSITION TO THE GRANTING OF WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

It is the position of the respondents that no sufficient reason appears in the petition filed herein by the Acting Solicitor General for the exercise of the Court's discretion to review these cases.

The petition concedes (p. 29) *that there is no conflict of decisions.* On the contrary, on many occasions the Board of Tax Appeals, the Federal District Courts, and many Circuit Courts of Appeals have been unanimous in recognizing the immunity of state instrumentalities such as The Port of

New York Authority (hereinafter called the Port Authority) in the regulation and development of ports and harbors, and waterways and highways. The Board of Tax Appeals has so held in eight separate decisions, three of them involving the Port Authority itself.[1] District Courts have decided in accord[2], and the Circuit Courts of Appeals for the First, Second and Ninth Circuits and the District of Columbia have so held.[3] All of these cases have been accepted by the States as the law for purposes of financing port and harbor and bridge and tunnel improvements which today represent an investment of not less than a billion dollars—a quarter of a billion in the case of The Port of New York Authority herein.

It was upon the basis of two most recent decisions of this Court itself, clarifying the law upon the very questions here involved that the Circuit Court of Appeals below affirmed the decision of the Board of Tax Appeals, *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; *Brush* v. *Commissioner,* 300 U. S. 352. We submit that the latter two cases settled the law in this Court—that bridge and highway construction and operation by state governmental agencies is a governmental function immune from Federal taxation. Whatever necessity

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[1] *Moisseiff* v. *Commissioner,* 21 B. T. A. 515; *Carey* v. *Commissioner,* 31 B. T. A. 839; *Case* v. *Commissioner,* 34 B. T. A. 1229 (the instant case below); *Fitzgerald* v. *Commissioner,* 29 B. T. A. 1113; *Modjeski* v. *Commissioner,* 28 B. T. A. 1051; *Harlan* v. *Commissioner,* 30 B. T. A. 804; *Wait* v. *Commissioner,* 35 B. T. A. 359; *Platt* v. *Commissioner,* 35 B. T. A. 472.

[2] *Boomer* v. *Glenn,* Western District of Kentucky, Jan. 14, 1938, 1938 C. C. H. Fed. Tax Service ¶9049; *United States* v. *King County, Washington,* 281 Fed. 686.

[3] *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, C. C. A. 2nd; *Commissioner* v. *Harlan,* 80 F. (2d) 660, C. C. A. 9th; *Commissioner* v. *Gerhardt,* 92 F. (2d) 999, C. C. A. 2nd, (the instant case below); *Halsey* v. *Helvering,* 75 F. (2d) 234, U. S. Ct. App. D. C.; *Jamestown & Newport Ferry Co.* v. *Commissioner,* 41 F. (2d) 920, C. C. A. 1st.

existed prior to those decisions for the clarification of the question here involved, has now disappeared. Unless this Court can be induced to reverse all of these decisions and, in addition, disregard the guiding principles in this field of constitutional law recently restated in *James* v. *Dravo Contracting Company,* decided Dec. 6, 1937, there can be no purpose in granting the writs here prayed for. Certainly the petition *offers not a single reason* in support of its plea for a reversal of those cases, contenting itself with the statement (p. 29) that

> "it seems plain that these decisions *are not so evidently correct* that the important questions of constitutional law presented in this petition can be taken to be settled." (Italics ours.)

But there is, in fact, much more than these cases which would have to be overruled. On May 20, 1929, the Commissioner of Internal Revenue ruled that the Alabama State Bridge Corporation was a *"primary governmental instrumentality,"* and that its bonds were not subject to tax by the Federal government.[1]

Again August 31, 1937, the Commissioner ruled, in a letter addressed to the Port Director of the Port of Corpus Christi, Nueces County Navigation District #1, that the district, created pursuant to Section 52, Art. 3, of the Constitution of Texas, as a navigation district, to improve rivers, bays, creeks and canals, and to construct and maintain canals and waterways, was "a corporate body of the State of Texas" and, as

[1] This opinion of the Commissioner was in accordance with the decision of the Supreme Court of Alabama, *Alabama State Bridge Corporation* v. *Smith,* 217 Ala. 311, 116 So. 695, holding "it is intended to put into use and operation public funds and agencies of the state for the common benefit of the people of the state. It would construct bridges for the public use and, in the end, free to the public. It is an arm of the state, with none of the limitations, disabilities or responsibilities that affect private corporations as such."

such, a political subdivision of the State of Texas, and that bonds issued by it, and paid for entirely out of the net revenues of the district's public facilities and not out of taxes, were exempt from Federal income taxes. On January 12, 1936, the Commissioner advised the Thousand Island Bridge Authority that it too was a political subdivision of the State of New York, and that following the rule established in *Weston* v. *Charleston,* 2 Peters 449, and *Pollock* v. *Farmers' Loan and Trust Co.,* 157 U. S. 429, 583, the interest on its bonds was exempt from Federal income tax. On the same day, January 12, 1936, the California Toll Bridge Authority was so advised. On February 17, 1937, the Buffalo and Fort Erie Bridge Authority was so advised. On March 7, 1937, the Treasury Department reversed a prior adverse ruling and held the Marine Parkway Authority immune from taxation.[1]

The question of the immunity of the bonds of such agencies has been in this case from the beginning. The Commissioner of Internal Revenue *insisted* upon inserting into the Stipulation of Facts (R. 932):

> "Respondent denies that the bonds of the Port Authority are exempted from federal taxation."

Yet, the State of New York holds $17,444,000. of Port of New York Authority bonds. The Federal Public Works Administrator is now under contract to buy from the Port Authority $29,100,000 of its 4% bonds to complete the second tube of the Lncoln Tunnel, if the Port Authority cannot raise

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[1] In taking these positions, the Treasury Department was but following the highest courts sustaining the governmental nature of such instrumentalities of the various states of the Union. (See *Robertson* v. *Zimmerman,* 268 N. Y. 52; *Gaynor* v. *Marohn,* 268 N. Y. 417; *Tranter* v. *Alleghany County Authority,* 316 Pa. 65; *In re California Toll Bridge Authority,* 212 Cal. 298; *California Toll Bridge Authority* v. *Kelly,* 218 Cal. 7; *Kelly* v. *Earle,* 140 Pa. 141.)

the money by public sale of its bonds. Before assuming this obligation, the Public Works Administrator insisted upon being furnished with opinion of bond counsel of his own choosing to the effect that such bonds were "exempt under the Constitution of the United States as now in force" (R. 938, 939) and accepted that opinion for his action in purchasing Port Authority bonds. The Reconstruction Finance Corporation has bought and sold hundreds of millions of dollars of bonds of this character, it being the policy of that agency to encourage the creation of such self-liquidating enterprises so that the government might recover out of revenues collected from users of such facilities, the moneys advanced by the Federal government during the depression.[1]

This Court is asked to reverse all the foregoing decisions, practices as well as the reliance thereon by investors in public securities, and to relegate all such agencies to the Siberia of "proprietary enterprises," leaving the states which created them to adjust as best they can the chaos such reversal would create in their fiscal policies. When the Commissioner seeks specifically to reverse the settled policy of regarding the construction of bridges, highways, and port improvements as governmental functions, such a revolution in legal and fiscal

[1] This appears to be a policy revived at the present time. The President has recently stated that he favors only self-liquidating public works. New York Times, Feb. 8, 1938, p. 1; id. Feb. 16, 1938, p. 8. Congress itself has recognized that such corporate municipal instrumentalities are members of the family of municipalities generally. The securities of agencies of just this type are expressly exempted from the provisions of the Securities Act (15 U. S. C. A., Sec. 77[c], par. 2), and of the Securities and Exchange Act (15 U. S. C. A., Sec. 78(c) [12]). The Public Works Administrator made the same determination under 40 U. S. C. A. Sec. 403(a)(2). On November 21, 1934 the Comptroller of the Currency ruled that national banks might purchase Port Authority securities under the statutory language "general obligations of any state or of any political subdivision thereof."

thinking should be supported by some cogent argument in a petition for a writ. *None is given.* The intimation that such a reversal will increase the revenues of Treasury will not stand analysis. Just the opposite is bound to ensue. A financial panic in government securities might very well occur.[1]

We recognize, of course, that the Commissioner of Internal Revenue has the power to change his opinion. But those who are engaged in the realistic task of creating and supporting public enterprises, and the maintenance of public credit, know only too well what the presence or absence of tax immunity means. On this subject *stability,* not dubiety, is vital. If the investor is in doubt, he turns to other fields. Whatever may be said in criticism of *stare decisis* in other fields, that rule is the life of the law upon which fiscal policy must be based.

No amount of argument, oral or written, will, we believe, induce this court, in the light of the universal statement of the applicable principles contained in the whole line of authorities, and reiterated in the *Rogers, Brush and Dravo* cases, *to make all the reversals necessary* to acceptance of the Commissioner's present contention.

In the closing paragraph of the petition, the Commissioner refers to the large number of port, harbor and bridge organizations that are "affected by the questions presented in this case." *They are not affected,* unless the Commissioner can succeed in reversing the law on the subject. The controversy which has "plagued" (to use the Petitioner's language, Pet.

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[1] Compare statement of Under Secretary Magill to House Ways and Means Subcommittee (Treasury Department Release Jan. 15, 1938): "Business men daily make decisions in the light of existing tax laws, and hasty changes can produce unexpected results of much greater significance than the revenue directly involved."

p. 21) both the Federal tax officials, the Port Authority and similar agencies, is a "plague" only because *the Commissioner refuses to follow the rulings, not only of himself and his predecessors, but also the Board of Tax Appeals, the high courts of the states, the Circuit Courts of Appeals, and this Court.*

It *is* important that this "plague" should be ended. It was with this in view that the Circuit Court of Appeals expedited and dispatched these cases by *deciding from the Bench,* finding that what was being asked for was reversal of its prior ruling in the *Ten Eyck* case. Unless the Commissioner presents in his petition some reason for overruling all these authorities, the denial of the writ must follow. Yet all the Commissioner has to say concerning these decisions is that they "are *not so evidently correct* that the important questions of constitutional law presented in this petition can be taken to be settled." (Pet. p. 29.)

This Court will not grant a writ of certiorari to review the decision of the Circuit Court of Appeals upon any such inadequate statement as this. We believe that the mere reading of the opinions of the Circuit Courts of Appeals (cited *supra,* p. 2, ftnt. 3.) will enable this Court to dispose of the entire question on the application for a writ.

WHEREFORE, it is respectfully submitted, that the petition for writs of certiorari in these three cases should not be granted, but should be denied by the Court on the basis of the cited decisions of the Circuit Courts of Appeals, as well as this Court's own decisions in the *Rogers and Brush* cases, relied upon by the Circuit Court of Appeals in its rulings in these cases.

Statutes Involved.

For the convenience of the Court the Clerk has been furnished with additional bound copies of Stipulation Exhibit E (R., 851, 852) being the Sixth Edition with Supplement of the compiled statutes of The Port of New York Authority. This Exhibit contains the Port Compact of 1921 between the States of New York and New Jersey (pp. 9-28), the Comprehensive Plan of the two States for the development of the Port of New York, enacted as a part of the Compact (pp. 30 and 33), and other Port Authority legislation referred to in this memorandum.

Statement.

The statement of the facts presented in the petition *does not* fully present the facts with respect to the creation of the Port Authority, its functions, and the plan of port and highway development which it is carrying out. By *omission, selection,* and *emphasis,* the petition attempts to set up a Port Authority which does not exist.

For a correct statement of facts, therefore, we rely upon and respectfully refer the Court to the Stipulation of Facts (R., 826 to 1025), the Board's Findings of Fact (R., 132 to 215), and the brief summary that follows. No challenge of any kind was made to any of the Findings of Fact made by the Board of Tax Appeals. We treat these Findings as uncontested in this Court.

The Record clearly supports the conclusion of the Courts below that the Port Authority is a governmental agency of the States of New York and New Jersey, engaged in carrying out one of the sovereign and usual functions of gov-

ernment—*the regulation and development of ports and harbors, their waterways, bridges, tunnels and highways.*[1]

The governmental problem faced by the States of New York and New Jersey in the development of the Port of New York is the direct result of the port's geography, of its tremendous concentration of population and commerce, and of its division into two states and over two hundred separate municipalities (Stip. of Facts, R., 833 and Ex. B, pp. 5, 6). These basic factors of geography, population, and political division are the factors that make the development of the port and harbor of New York a unique and extraordinary governmental problem (R., 832, 833; 140 to 144).

About one tenth of the entire population of the United States lives in the port district. Here lie the financial and industrial centers of the country. Here is the focal point of our national transportation system. More than half of our foreign commerce enters or clears within this district (Stip. Ex. B, pp. 1, 2).

Although its magnificent natural harbor and the resultant forces of world commerce give the port of New York its

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[1] An interesting commentary on the work of the Port Authority is found in "The Public Authority: Some Legal and Practical Aspects," by Peter R. Nehemkis, 47 Yale Law Journal, 14 at 30, 31, as follows:

"The Port of New York Authority alone has succeeded in carrying out a scientifically determined program of regional planning. Under unified management and control the Port Authority has provided an economically adequate solution to the harbor, bridge, tunnel, railroad, and freight distribution problems of the New York metropolitan area. In the sphere of planning the Port Authority has served a two-fold purpose: it has provided a mechanism for consultation among various local governments for the development of integrated programs of related activities, and in the interstate sector of its operations it has projected blueprints for the development of broad-gauge harbor, port, communication and traffic facilities. In short, through a functional adaptation of the public corporation The Port of New York Authority is effectively bridging the hiatus which exists between economic and political spheres of government."

position of leadership, New York nevertheless trailed behind the ports of the world in properly utilizing its natural advantages. The equipment and improvement of the port had grown from time to time out of the necessities of the moment. Prior to the cooperative action of the two states in 1916, there had been no cooperative regional planning. The port had failed to keep pace with competing ports (R., 141, 142; 833, 843, 844 and Stip. Ex. B, pp. 1-40).

The Port Compact of 1921 amended and supplemented the Treaty of 1834 between the two States (R., 138, 832). With the establishment of the packet lines and the development of the clipper ships in the early Nineteenth Century, world commerce had begun to converge upon New York. The Erie Canal had been finished in 1825. With its opening, settlers in the West began trading eastward through the Canal to the Hudson River and the Port of New York. *New York Harbor Case,* 47 I. C. C. 643, 656.

Construction of the Camden and Amboy Railroad, the first railroad to enter the port district, two years before the signing of the Treaty of 1834, foreshadowed the passing importance of the inland waterways to which New York had primarily owed its early development and growth. The great rivers which emptied into New York Harbor had been a most vital factor in the growth of the port, but after 1832 they became also one of the great natural barriers to American transportation—*for the largest city in the world is separated from the mainland of the United States by the waters of the Hudson River and New York Harbor.*

The Treaty of 1834 effectively settled the early quarrels of New York and New Jersey over the port area. It established the boundary line in the middle of the harbor and the Hudson River, giving New York jurisdiction over the waters

of the harbor and the river to the low water line on the Jersey shore. The paramount importance of the development of the Port of New York to the health, safety and general welfare of the people of the port district, have been stressed in almost every case involving the construction of the Compact of 1834.[1]

The Compact of 1834 dealt only with boundaries and territorial jurisdiction. But the subsequent growth of American industry, the coming of the railroads and the automobile, the mounting volume of foreign commerce—requiring greater, more modern and efficient use of the port's waterfront—all brought new social problems and new economic conflicts calling for the exercise of sovereign powers.

A great era of railroad building brought the convergence of the rails of the nation upon its commercial capital, the Port of New York. It was physically impossible, however, for the rails to reach the City itself—they were blocked on the Jersey shore and with them was halted the supply of food, fuel, and other vital necessities of life in the metropolis.

While the river between New York and New Jersey and the waters of New York Bay are what Mr. Justice Holmes called "a treasure", they are also a handicap. During some winters, these waters are clogged with ice; food and coal cannot be lightered across. Fog, too, is a constant menace (R., 185, 1270-1278). This realistic situation brought drama-

[1] Thus in *Ferguson* v. *Ross*, 126 N. Y. 459, 465, Judge Andrews wrote:

"The citizens of New York city may possibly have a greater stake in the matter than the citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state. It would impair its revenues, imperil its system of river, canal and railroad transportation, and it is not too much to say that every industrial interest, agricultural or mechanical, would feel its blighting influence."

tically to the front *two movements,* one the building of the *first* vehicular tunnel in this country and the *second,* the creation of the port authority by interstate compact.

The tunnel was a pioneer experiment because of the ventilation problem. Private enterprise could not have built such a tunnel. Only the two States by agreement between them could do the job. It cost $50,000,000. New Jersey elected to meet her half of the contribution by state bond issue, and the bond issue was large enough to cover the Camden Bridge across the Delaware River. Both were treated as one great highway improvement. The bonds were to be repaid out of tolls collected from the users of both the tunnel and the bridge (R., 907, 908). New York State paid for its half of the cost of the Holland Tunnel by appropriations out of the Treasury (R., 908). Title to the tunnel is vested in the two States. Legislation directs how the revenues of the tunnel shall be applied (Ch. 421, Laws of N. Y. 1930; Ch. 247, Laws of N. J., 1930; R., 914, 915).

So much for the beginnings of vehicular crossings between the two States. The more general problem of freight handling had originally been met by ferrying across the waters of the lower Hudson. With the increasing population and commerce, it gradually became apparent that this was no adequate solution. It left to the mercy of the elements the health, safety, and even the lives of the population (R., 1113-1117). Congestion in the waters and in the streets about the railroad terminals became an ever increasing menace. Besides, the costliness of this method of harbor ferrying was reflected in mounting costs of living (R., 1195-1197, Stip. Ex. B, pp. 1, 2).

Up to 1917 the port's development had never been planned and it had failed to keep pace with the physical

development of other ports (R., 141, 142, 833, 836, 837, 843, 844; Stip. Ex. B, pp. 1 to 40; *New York Harbor Case,* 47 I. C. C. 643).

Finally, in 1916, the problem became so acute that the people of both States demanded a solution. They saw that this density of population, the enormous concentration of commerce, and the resulting traffic congestion, necessitated the prompt creation of coordinated and efficient port and highway facilities. For seventy years now, freight had been shuttled uncertainly across the waters to and from the railheads on the Jersey shore. The most valuable of public waterfront properties had become cluttered with railroad pier stations to the exclusion and loss of steamship traffic, drastically in need of pier space. *(New York Harbor Case, supra,* at pp. 732, 733 and 739; Stip. Ex. B, pp. 278, 345, *et seq.;* R., 1113 to 1120). No adequate provision for the motorization of vehicular traffic had been made. This new and constantly growing traffic so congested the streets of the port district that many had become well nigh impassable (R., 1289 to 1305). Lack of vehicular bridges and tunnels, of coordinated freight handling facilities and terminals, of express highways, modern piers and markets—all resulted in confusion, delay and economic waste (R., 141, 142, 837; Stip. Ex. B, pp. 1-40).[1]

This grave and serious crisis was forcefully brought to public attention by the *New York Harbor Case,* 47 I. C. C. 643 (R., 834-836).

That case sought a revision of railroad freight rates in favor of New Jersey. It aroused great opposition in New

[1] For judicial recognition of these facts, see, among other authorities, *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515; *Moisseiff* v. *Commissioner,* 21 B. T. A. 515; *Bush Terminal Co.* v. *The City of New York,* 152 N. Y. Misc. 144, 148.

York (R., 836). The Interstate Commerce Commission saw clearly that the real problem was not so much one of freight rates, as one requiring complete reorganization and coordination of port facilities. The Commission's report was, in its very language, a sharp criticism of the bad arrangement of the port and it pressed upon the States the necessity for closer cooperation between them. (See particularly pp. 653, 732, 733 and 739 of that case.)

The creation of the New York, New Jersey Port and Harbor Development Commission in 1917[1] was the result of the vast public interest in the port problem aroused by the *New York Harbor Case*. The States appropriated $450,000.00 for the work of this Commission, directed the Commissioners to make a comprehensiive survey of port and harbor conditions, and to recommend proper and adequate remedies, together with constructive plans for the port's development (R., 139. 140, 837-839).

The ultimate conclusion of the Bi-State Commission was that, whatever physical plans might ultimately be worked out, *the situation imperatively required the bringing together of the two States in a compact resolving conflicting interests, and setting up legal machinery through which their cooperation could be made continuous and effective.* The public demand for the Compact, its support by the Governors, and its adoption by the Legislatures are adequately covered by the Board in its Findings of Fact and in the Stipulation (R., 133-147, 841-854).

The Compact itself is part of the Record (Stip. Ex. E, pp. 13-28). It provided for the adoption of a Comprehensive Plan for development of the Port District. The Port Au-

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[1] Chapter 426, Laws of New York, 1917, and Chapter 130, Laws of New Jersey, 1917.

thority formulated such a plan. It was adopted in 1922. The States declared it "binding upon both States with the same force and effect as if incorporated in this agreement" (Compact Article XI). It was sanctioned by Congress on July 1, 1922.[1] Subsequent amendments added particular bridge and tunnel projects to this Comprehensive Plan (R., 870, 871, 881, 889, 916).

The Port Authority has now been carrying forward this program for seventeen years. During that time it has provided the States with bridges, tunnels and terminals. It has worked continuously on a program of port coordination, protection and development.

In 1923 the States directed the Port Authority to study the problem of interstate bridge and tunnel construction (R., 862). The increasing development of the motor vehicle had intensified the problem which the Port Authority was originally created to solve. By State direction since that time, the Port Authority has constructed, and is now operating the Goethals Bridge and the Outerbridge Crossing;[2] the George Washington Bridge;[3] the Bayonne Bridge,[4] and the new Lincoln Tunnel.[5]

The Holland Tunnel Commission was abolished and its operations and revenues were turned over to the Port Authority. The tunnel revenues were to be pledged, first to raise $50,000,000. (which the Port Authority did raise and turned into the two States) to relieve the then pressing

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[1] Public Resolution No. 66-67th Congress, H. J. Res. 337; Exhibit E, page 45. In this resolution Congress found that "* * * the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation."

[2] R. 148-153, 862-880.

[3] R. 153-155, 881-890.

[4] R. 156, 157, 889-896.

[5] R. 163-168, 887-924.

burdens of taxation. They were, in addition, to be used to support other bridges and tunnels connecting the two States, to be built and operated by the Port Authority, as the agency and instrumentality of the two States. (Ch. 420, Laws of N. Y., 1930; Ch. 248, Laws of N. J., 1930; Ch. 421, Laws of N. Y., 1930; Ch. 247, Laws of N. J., 1930; Ch. 47, Laws of N. Y., 1931; Ch. 4, Laws of N. J., 1931.)

Reference to the Stipulation (Ex. K, R., 937) shows that the two States have always retained complete control of all Port Authority revenues. Chapter 48, Laws of New York, 1931 and Chapter 5, Laws of New Jersey, 1931, "regulating the use of revenues received by the Port of New York Authority," after directing that these revenues should be pooled for general port development purposes, specifically provided that surplus revenues shall be used subject to the direction of the two States (Ex. K, R., 937). *Thus, the Port Authority holds the property of the two States under statutory trust, the revenues to be applied as jointly directed by the two States* (R., 914, 915). Every dollar of revenue must be applied first to operating expenses and then to the liquidation of the debt incurred for the purpose of constructing these facilities, surpluses ultimately to go back to the two States, or otherwise disposed of, as directed by the two States. Even before this is done, the Port Authority is put under statutory obligation to pay back to the States cash advances of $14,000,000. (R., 930).

The Port Authority's work in the study and development of the transportation, highway and terminal facilities, and of the port's freight handling methods, and the construction of Union Inland Terminal No. 1, have constituted a vital part of its program (R., 170-180, 944-954). It has effected substantial progress in connection with planning of railroad

belt lines, harbor congestion, freight delivery, pier development, harbor and channel surveys, coordination of railway marine activities, transportation of explosives in the harbor, free ports and tariff zones and pier storage (R., 183-187). It appears constantly before the Interstate Commerce Commission and the Shipping Board, the Federal Courts, and other regulatory and judicial bodies in defense of the interests of the port (R., 187, 986, 1347-1362).

Petitioner devotes much space to the rentable areas in the Port Authority's Inland Terminal No. 1, and the methods of leasing that area. Not a word is said about the purpose of the terminal and its place in the Comprehensive Plan. On this distorted presentation of facts the conclusion is reached (Pet., p. 22) that this Inland Terminal is "clearly proprietary in character."

The construction of inland terminals is a basic part of the Comprehensive Plan. Such terminals are the real key to the solution of the whole problem of freight distribution in the Port District. The Government disputes this. It attempts to create the impression that an inland terminal is nothing more than a commercial office building. Yet the Board below found as a fact[1] (R., 170, 171):

> "The Port Authority has extensively studied the port district's system of transportation, highway and terminal facilities and methods of handling freight used by the railways, ferry companies and other transportation agencies, and has sought methods of remedying street, highway, and waterfront congestion within the district. In its reports, which are made annually or more often,

[1] The binding effect of findings of fact made by the Board of Tax Appeals need not be restated. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *General Utilities and Operating Co.* v. *Helvering*, 296 U. S. 200, 206. The Court's recent reminder is that the findings affirmed below "are unassailable if resting upon substantial support." *Alabama Power Co.* v. *Ickes*, decided Jan. 3, 1938.

it advised the governors and legislatures of both states that it was taking steps to remedy the congestion *by an integrated and coordinated system of union inland freight terminals at various points in the port district, and it has been assisted in these projects by state appropriations and requisite legislation.*" (Italics added.)

The Board found that the terminal building "received the approval of the governors and legislatures" (R., 173).

The Board concludes that (R., 176):

> "The union terminal has lightened traffic congestion and effected substantial savings to merchants in time and trucking costs, * * *."

The Government has attempted to picture the upper stories of the terminal simply as a rent producing activity (Pet., pp. 12 to 14, 22). Nothing could be further from the fact. To understand the method designed by the two States in providing Inland Terminal No. 1, and in financing it out of "tolls" or revenues derived from the utilization of surplus space in the upper stories of the Terminal itself, all that is required is understanding of the "authority financing plan."

In imposing upon the Port Authority the duty of effectuating the Comprehensive Plan, the States deliberately vested it "with all necessary and appropriate powers * * * to effectuate the same, except the power to levy taxes and assessments." (Comprehensive Plan, Sec. 8). The Port Authority was given power to issue bonds, but was obliged to plan public projects in *such manner as would insure sufficient income to meet the expenses of operation and maintenance as well as interest and sinking fund requirements. Unless the Port Authority could demonstrate to purchasers of its bonds that a particular project was self-supporting, it would be unable to raise the moneys necessary to finance that pro-*

ject, and without such financial assistance the Comprehensive Plan could never be effectuated (R., 180).

It was obvious at the very outset that a properly designed terminal would require an unusual amount of ground area so that the maximum number of trucks might be accommodated around the freight platforms. But real property in Manhattan Island is the most costly in the world, and the construction of a building covering a square block and yet only one or two stories in height is a financially impracticable project. No building of such limited height could produce sufficient revenue to support the capital expense of its site and of its construction (R., 1141-1143).

Thus, the only way in which the States could obtain the urgently needed inland terminals on the required self-liquidating basis *was to adopt the normal economic method of using the surplus air-rights over the Terminal itself, for the production of incidental revenue.* The Board clearly recognized this when it found (R., 180):

> "Its construction and rental were deemed necessary to provide sufficient revenue to make the terminal facility economically practical, for the Port Authority received no subsidy for the terminal from the states, and had to raise its $16,000,000 costs by bonds. To sell the bonds it was necessary to show sufficient prospective revenue from the project to make them attractive."

The Findings here establish the relationship of the Terminal Building as a part of an entire bi-state legislative plan of coordination. The Government, in its stress upon the business-like methods used by the Port Authority in its operations, seems to think that if it can convince this Court that the Port Authority operates efficiently, as would a business enterprise, then it cannot be considered governmental.

The character of the upper stories of Inland Terminal No. 1, as incidental to a governmental purpose is paralleled by the operations of the Panama Rail Road Company in *New York, ex rel. Rogers* v. *Graves, supra.* The Supreme Court concluded (p. 404):

> "In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered *not as things apart but in their relation to the Panama Canal;* and it is clear that the railroad and ships, after the completion of the Canal, continue to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the Canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the Canal as to confer upon the company a like immunity?" (Italics ours.)

In the *Rogers* case it appears from the record that the Panama Rail Road Company not only operates a railroad, steamship line and piers, but operates incidentally hotels, warehouses, docks, restaurants, dairy and food stores. According to the report of the Secretary of War, last year, the Panama Rail Road was able to make a net return of over $1,519,629. after the payment of all operating expenses.[1]

The Petitioner suggests that the Port Authority must be deemed to be proprietary because of its receipt of operating revenues (Pet., p. 23). Reference to the above case should dispose of this contention. Yet it is stipulated (R., 991) that all Port Authority projects are operated in the interests of the public and that "no profits inure to the benefit of private persons." It is also stipulated (R., 990) that there are no stock and no stockholders and that the Port

[1] New York Times, January 9, 1938.

Authority is not owned or controlled by any private persons or corporations. It is therefore obvious that even if there were surpluses they would belong to the two States. The sums which the Government labels "surplus" are simply the net income over and above operating and interest charges. *They are entirely consumed in amortizing the cost of these designedly self-liquidating public works.* Any revenues over and above these amortization requirements must be held subject to disposal by the two States (Chap. 5, Laws of New Jersey, 1931; Chap. 48, Laws of New York, 1931; Stip. Ex. K).

Upon the facts found by the Board, and stipulated by the parties, there can be no escape from the conclusion reached by the Board below (R., 218):

> "The Port Authority is organized for and operating in the traditionally sovereign function of protecting, improving, and developing the Port of New York; and all its activities are directed to and are incident to that end."

Reasons for Denying the Writs.

Though the Government admits that the precedents and authorities in these cases are unanimously in accord with the decisions of the Board and the Circuit Court of Appeals below, they, nevertheless, urge four questions (Pet., p. 21) which they would submit to this Court because the "decisions are *not so evidently correct*" that they "can be taken to be settled" (Pet., p. 29).

That no open or substantial question is presented in the Government's four Points should be clear from the following considerations:

1. The Activities of the Port Authority are Clearly Governmental.

A constitutional issue cannot be more definitely settled than is the issue here, by the authorities relied on as conclusive in the opinion of the Court below. *Brush* v. *Commissioner,* 300 U. S. 352 and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401 are a complete affirmance of the principles upon which the Circuit Court decided these cases. In those two opinions, this Court considered and rejected every argument which the Government advances here in support of its contention that the activities of the two States, exercised through their agent the Port Authority, are proprietary.[1] Not only did those opinions, together with *James* v. *Dravo Contracting Company,* decided Dec. 6, 1937 place a 1937 approval on *Collector* v. *Day,* 11 Wall. 113, but in the *Rogers* case the Court expressly joined *canal, waterway, bridge, terminal* and *highway* development as immune governmental functions. Moreover, that case firmly established the authority of government to select any instrumentality it chooses and pointed out that from the immunity of such instrumentality "it necessarily results that fixed salaries and compensation paid to officers and employees in their capacity as such, are likewise immune."[2]

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[1] This case was commenced upon clear misconceptions of the effect of this Court's decision in *Helvering* v. *Powers,* 293 U. S. 214. The later decisions in *Brush* and *Rogers* should have dissipated these misconceptions. The Commissioner—in light of these later decisions, has abandoned many of the contentions of fact and law advanced in the lower Courts—but he seems unable to abandon the main quest.

[2] This statement of the Court in so recent a case, is sufficient in itself to dispose of the question numbered "(4)" on page 22 of the Government's Petition, as to whether, "if the Port Authority itself is immune from Federal taxation, this immunity operates to exempt its employees from a non-discriminatory income tax."

The *Brush* case effectively disposed of the principal arguments which the Government seeks to reargue in the instant case. The decision went directly to one of the most important functions of the Port Authority when it stated:

> "A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it * * *; but this does not destroy the claim that the maintenance of the highway is a public and governmental function."

From the standpoint of precedent, there can be no escape from the determination of the Circuit Court, both in *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, and in the instant cases, of the governmental nature of port and harbor development by State agencies. The Court expressed this conclusion in the *Ten Eyck* case, in the following language (76 F. (2d) 515, 517, 519):

> "Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people * * *.
>
> "The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not withdrawing sources of revenue from the federal taxing power."

The authorities in support of the Circuit Court's conclusion in these cases are sufficiently stated in that opinion.[1] See also *Mobile County* v. *Kimball*, 102 U. S. 691.

That the construction and operation of interstate bridges and tunnels is a governmental function, is likewise clear.

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[1] The superior status as governmental activities of port and harbor developments over even municipal water supply was suggested by the same Circuit Court in its decision in *Brush* v. *Commissioner*, 85 F. (2d) 32; 35.

Highways, bridges and tunnels have been a first concern of government. In addition to the *Rogers* and *Brush* cases cited above, see *Butler* v. *Perry,* 240 U. S. 328; *Atkin* v. *Kansas,* 191 U. S. 207; *Escanaba Co.* v. *Chicago,* 107 U. S. 678; *United States* v. *King County, Washington,* 281 Fed. 686; *Jamestown & Newport Ferry Co.* v. *Commissioner,* 41 F. (2d) 920; *Halsey* v. *Helvering,* 75 F. (2d) 234; *Commissioner* v. *Harlan,* 80 F. (2d) 660.

In addition to the foregoing arguments from precedent, the same conclusion may be reached by applying the pragmatic method of inquiry which this Court adopted in the *Rogers* and *Brush* decisions. As we read those two cases, the Court established three criteria from which it might conclude whether a given function was governmental or proprietary. These three lines of factual inquiry are:

> (a) *What were the public necessities which required state or federal action?*
>
> (b) *Is the agency selected truly an instrument of government?*
>
> (c) *To what extent have governments exercised the function?*

The answers for the Port Authority follow:

(a) *The public necessity which required the creation of The Port of New York Authority was a necessity of joint state action in the development of the Port of New York.* This necessity is a fact which must be deemed conclusive herein on the basis of the Board's Finding of Fact (R., 138):

> "This Compact, which amended and supplemented a former one entered into between New York and New Jersey in 1834, was induced by the necessity, widely recognized, for joint state action in the development as a whole of the Port of New York, which lies partly within the jurisdiction of each state."

So, too, it is stipulated herein (R., 832, 833, 837, 839) that "* * * it has been necessary that any action that has been taken by the two States for the development of the Port as a whole, be joint action by the two states."[1] It is stipulated further that in 1916 the two states "found themselves faced with the problem of the Port's future development" (R., 833). It is stipulated that the *New York Harbor Case* "aroused considerable public discussion of the problems involved, including discussions of the desirability of a revision in the methods of handling the port traffic, the desirability of unifying the port's transportation system, and such efforts as might be desirable upon the part of both states to effectuate the reorganization" (R., 837). And it is stipulated that the Port and Harbor Development Commission "thoroughly carried out" its survey and recommended "an interstate compact to provide a bi-state corporate agency, to carry out a comprehensive plan of port and harbor development under the direction of the two States * * *" (R., 839, 840).[2]

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[1] In its report, the New York State Joint Legislative Committee on State Fiscal Policies, submitted to the Legislature December 27, 1937, said:

> "The first important authority established in this country was The Port of New York Authority, which was created by joint action of the States of New York and New Jersey and was called into being *because of the necessity of performing certain public functions within a single economic unit which unit, however, was hopelessly divided by political jurisdictions.*"

[2] Governor Lehman, in his Annual Message to the Legislature, on January 1, 1936, summed up the governmental necessity behind the creation of the Port Authority as follows:

> "In developing the Port of New York, we were faced with dual political sovereignty. Neither New York nor New Jersey could regulate the Port. And so, the Authority was conceived in response to the imperative demand for a continuing body with ample powers to meet the problems arising out of commerce and the operations of the two states lying within the Port District."

See, also, the observations of the Circuit Court of Appeals on the necessity for the creation of the Port Authority, expressed in *Commissioner v. Ten Eyck*, 76 F. (2d) 515, 518.

Obviously—following the reasoning of this Court in the *Brush* case—the Port Authority, too, was created to "protect the health, safety and lives of its inhabitants." The declaration of the two States is (Sec. 14, Chap. 4, Laws of New Jersey, 1931 and Sec. 14, Chap. 47, Laws of New York, 1931):

> "The construction, maintenance and operation of vehicular bridges and tunnels within the said Port of New York District * * * are and will be in all respects for the benefit of the people of the States of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation thereof and in carrying out the provisions of law relating thereto, and shall be required to pay no taxes or assessments upon any of the property acquired or used by it for such purposes."

This determination by the State Legislatures proceeded from a factual investigation by a joint State Legislative Commission (Stip. Ex. B, pp. 1, 7). The legislative judgment "is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility." This Court merely examines "the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the *legislative choice is without rational basis.*" (Italics ours.) *South Carolina State Highway Department* vs. *Barnwell Bros. Inc.*, October Term, 1937, #161, decided Feb. 14, 1938.

In the *Rogers* case the Court, after reviewing the necessity for the ownership of the Railroad Company by the Government in connection with the Canal, concludes that the public

health, the making of sanitary rules and regulations, the national defense and the regulation of commerce, all required such governmental ownership. The Court specifically points out that through the Railroad Company the Government provides maritime facilities for the Canal Zone, and that the Government exercises its jurisdiction over "the ports at the ends thereof." The Court refers not only to the Canal itself, but to the governmental function of building and operating bridges and roads. *Every single one of these factors is paralleled in the public necessity which led to the creation of the Port Authority* (Stip. Ex. B, p. 35).

In the *Rogers* case this Court found that the public necessity for the construction of the Canal and the acquisition of the Panama Rail Road included the regulation of commerce. That purpose is also achieved by the Port Authority. This Court said (p. 406):

> *"The building and operation of a bridge or a road or a canal* is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation." (Italics ours.)

Such a purpose in the Port Authority was announced by the States in the Port Compact (Stip. Ex. E, p. 13):

> "It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the Port of New York, will result in great economies, benefiting the nation as well as the States of New York and New Jersey."

The coordination of conflicting port interests could not be accomplished save through the offices of a governmental agency (R., 1192-1194 and 1214-1216). It was this very inability of private enterprise, or even of the two States

separately, to achieve adequate development of the port, which led to the dangers pointed ont in the *New York Harbor Case.*

In the final analysis, the action of the States in creating the Port Authority was the result of the conviction of the Governors and Legislatures of the two States that the problem was so intimately bound up with the public welfare as to make unthinkable any solution by other than a direct instrumentality of the two States. This determination was clearly within the province of the two States. *Brush* v. *Commissioner,* 300 U. S. 352, 371.

We conclude, therefore, the answer to the inquiry made in this Point:—that the Port Authority fulfills the first of the tests proposed by the Courts, that with respect to the public and governmental necessity which forced its creation.

(b) *The Port Authority is the governmental instrumentality of the States of New York and New Jersey.* As this Court noted in its recent decision in *James* v. *Dravo Contracting Co.,* decided December 6, 1937, the nature of governmental agencies and the mode of their constitution cannot be disregarded in passing on the question of tax exemption (p. 16 of the pamphlet print of the *Dravo* case). The Court pointed out that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the government "that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power." Your Honors said that "it was on that principle that 'any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled

by the other, exclusively to enable it to perform a governmental function,' was prohibited."

The status of the Port Authority as just such a governmental instrumentality becomes clear from consideration of its very nature and attributes and from the means employed by the States to effect its creation.

Inquiry into the governmental character of the Port Authority is answered by the declarations of the two Legislatures and of the Congress, that the Port Authority *is* "the joint or common agency" of the two States, "a body corporate and politic" and the "municipal corporate instrumentality" of the States (Stip. Ex. E, pp. 13, 43).[1]

The state courts have repeatedly found that port districts, from their very nature and powers, are municipal corporations and governmental instrumentalities. *Rosenkranz* v. *City of Evansville*, 194 Ind. 499, 143 N. E. 593; *State* v. *Port of Astoria*, 79 Ore. 1, 154 Pac. 399; *Stevenson* v. *Port of Portland*, 82 Ore. 576, 162 Pac. 509. In the *Ten Eyck* case, the Court said of the action of the two States in creating the Port Authority:

> "They joined in an agreement for the creation of a *governmental agency* * * *." (Italics ours.)

Again, the powers, privileges and immunities of the Port Authority are those of an instrumentality of government completely integrated into the governmental systems of the two States. It is unnecessary here to detail the attributes, powers and immunities of the Port Authority which establish its nature as an agency of government. They are all stipu-

[1] These statements are entitled to the great weight and respect which the courts have always accorded legislative declarations. *Block* v. *Hirsh*, 256 U. S. 135; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242; *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U. S. 240.

lated (R., 851, 853; 966-995) and are found as facts by the Board below (R., 199-207).

The States chose the Port Authority as the more efficient alternative to their own performance of their sovereign functions in the development of the Port. They were able thus to achieve the substitution of an economic for a political boundary line, to avoid the problem of dual sovereignty, the huge increase in the state debt, and to establish a permanent body not affected by political changes which so often obstruct long range planning.

Both State and Federal Courts have repeatedly found the Port Authority to be the agent of the States. To the utterances of the Court in the *Ten Eyck* case we add:—the Circuit Court for the Third Circuit in *City of Newark* v. *Central R. R. Co. of N. J.*, 297 Fed. 77, similarly referred to the Port Authority as a governmental body. The Board of Tax Appeals so found not only in the instant cases, but also in *Moisseiff* v. *Commissioner,* 21 B. T. A. 515, and *Carey* v. *Commissioner,* 31 B. T. A. 839. The New Jersey Court of Chancery so held in *New Jersey Interstate Bridge & Tunnel Commission* v. *Jersey City,* 93 N. J. Eq. 550, and *State Highway Commission* v. *Elizabeth,* 102 N. J. Eq. 221. The New York Court of Appeals so referred to the Port Authority in *Gaynor* v. *Marohn,* 268 N. Y. 417; and the New York Supreme Court so held in *The Port of New York Authority* v. *Lattin,* N. Y. L. J., Dec. 3, 1930; *Boyle Holding Corp.* v. *Medgreen,* 154 N. Y. Misc. 189, and *Bush Terminal Co.* v. *City of New York,* 152 N. Y. Misc. 144. Most recently the Supreme Court of the State of New York held the Port Authority to be immune from suit on the ground that "it was created by treaty between the States of New York and New Jersey and is thus clothed with sovereign immunity." *Pink*

v. *The Port of New York Authority,* N. Y. L. J., Feb. 3, 1938, p. 567.

(c) The third and final inquiry suggested by the opinions of this Court in the *Rogers* and *Brush* cases is: *to what extent have governments exercised the function?* We submit that governments have universally exercised the function of developing their ports, harbors, highways, bridges and tunnels. This conclusively appears from the historical and factual review made by the Circuit Court of Appeals in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 517, 518 from which it concluded that ownership, control and operation of port facilities are essential and usually prerogatives of sovereignty; especially of the sovereignty of the constituent state governments of the United States.

Similarly, and as we have already pointed out, on the basis of precedent, the construction and operation of interstate bridges and tunnels is clearly a governmental function.

Highways, bridges and tunnels have always been a first concern of government. As pointed out in *Boomer* v. *Glenn,*[1] "The construction and maintenance of highways and bridges as a governmental function is one of the most ancient known to the law, having had its beginning prior to the civil or common law." The Court here points out the obligation of every parish, under the common law, to keep its roads and bridges in repair, and that no man, regardless of rank or dignity, was "exempt from work in the construction and repair of ways and bridges." *Cooley's Blackstone,* 4th Ed., Book I, 304. The embodying of this prnciple of English Law in the statutory law of every one of the states is clearly traced.

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[1] Western District of Kentucky, January 14, 1938, C. C. H. Federal Tax Service, paragraph 9049.

Today, the combined expenditures on capital outlay and maintenance of highways is the largest item in state budgets.[1]

2. The Port Authority is the Agency of the States Alone.

The Board below completely disposed of the Government's argument that Congressional consent to an interstate compact destroys state immunity (R., 224). The Petitioner draws into this case the memorandum filed on behalf of the Attorney General in *Hinderlider* v. *The La Plata River and Cherry Creek Ditch Company*, #437, present Term, and refers to the argument therein that a compact has the status of an act of Congress (Pet., p. 25). We ask, in turn, that the memorandum filed in the same case by the States of Delaware, Maryland, New Jersey and New York, The Port of New York Authority and The Delaware River Joint Commission (in which memorandum the States of Virginia and Oregon also joined) be considered here as a complete refutation of the petitioner's contention that Congressional

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[1] Thus, in 1929 and 1930 (the last years for which complete figures are available) the combined expenditures of all states in capital outlay and maintenance were as follows:

1929	
Total Expenditures	$1,992,705,957
Highways	752,171,713
Education	559,737,280
Charities, Hospitals and Correction	260,634,569
General Government	126,709,168

1930	
Total Expenditures	$2,178,279,827
Highways	886,514,579
Education	598,058,080
Charities, Hospitals and Correction	276,896,277
General Government	124,866,796

These figures are found in the reports of the United States Department of Commerce, Bureau of the Census, entitled "Financial Statistics of the States" for the years 1929 and 1930.

consent to a compact renders the compact in effect an act of Congress and so deprives the states of their sovereignty. Upon the submission of the latter memorandum to this Court, the Attorney General retired from the broader position previously taken by him.[1]

There is and can be no support for the petitioner's argument that Congressional consent given to states (as here) to act *as sovereignties,* to create and own property *as sovereignties,* to apportion revenues from joint properties *as sovereignties,* to use such revenues and properties for their joint advantage *as sovereignties,* produces as a matter of constitutional law the result that these very properties and revenues so created, so collected and so disposed of, shall be taken from the states by the Federal Government by taxation. If, as is urged here, the Port Authority is the creature of Congress, and, as was said below, "It exists subject to the caprice of the Federal Government," then indeed, as the Attorney General argued in his first memorandum in the *Hinderlider* case, the states are but "Crown Colonies." Then indeed, that which they create by compact becomes subject to complete disposition by the Federal Government.[2] However, the *Brush*, *Rogers* and *Dravo*

[1] See Attorney General's memorandum in that case dated February, 1938.

[2] "*An over-centralized government would break down of its own weight.* It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. *If there were centered in Washington a single source of authority from which proceeded all the governmental forces of the country—created and subject to change at its will—upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. If we did not have states we should speedily have to create them.*" (Italics ours.) Address of Hon. Charles E. Hughes, New York State Bar Association, Jan. 1916.

opinions teach us that this Court will not change the form of this Government and make of the states such satrapies of the Federal Government.

3. Federal Regulation of Interstate Commerce Does Not Impair the Immunity of State Instrumentalities.

This argument was raised and disposed of in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 517, 518 and *Commissioner* v. *Harlan,* 80 F. (2d) 660, 662 by the Circuit Courts, and by this Court in *United States* v. *California,* 297 U. S. 175, 184.

The Petitioner's contention is based on the theory that the regulation of interstate commerce and the control of navigable waters are matters exclusively within the sphere of Federal sovereignty. That is not the law. The courts have repeatedly held that the states have exclusive power and jurisdiction over navigable waters and interstate commerce within their territorial limits, where the Federal Government has not preempted the field.[1] "This power embraces the construction of roads, canals and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority." *Escanaba Co.* v. *Chicago,* 107 U. S. 678.

Even as this memorandum is written, the entire point of the Government's argument in this field is demolished by

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[1] *Gibbons* v. *Ogden,* 9 Wheat. 1; *South Carolina* v. *Georgia,* 93 U. S. 4; *United States* v. *Bellingham Bay Boom Co.,* 176 U. S. 211; *Wilson* v. *Black Bird Creek Marsh Co.,* 2 Pet. 245; *Rundle* v. *Delaware & Raritan Canal Co.,* 14 How. 80; *Gilman* v. *Philadelphia,* 3 Wall. 713; *Lake Shore M. S. R. Co.* v. *Ohio,* 165 U. S. 365; *Pound* v. *Turck,* 95 U. S. 459; *Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204; *Pennsylvania* v. *Wheeling & B. Bridge Co.,* 18 How. 421; *Sage* v. *The Mayor,* 154 N. Y. 61; *Ferguson* v. *Ross,* 126 N. Y. 459.

the Court's decision in *South Carolina State Highway Department et al.* v. *Barnwell Bros., Inc., et al.*, October Term, 1937, #161, decided February 14, 1938. We quote especially the following:

> "Few subjects of State regulation are so peculiarly of local concern as is the use of State highways. From the beginning it has been recognized that a State can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competency *even though interstate commerce is materially affected.*" (Italics ours.)

Furthermore the Petitioner is clearly on unstable ground also when he urges that the Federal Government's power to regulate navigation and interstate commerce includes the power to tax *for revenue*. That conclusion rests upon complete confusion between *the Federal power to regulate and tax as an incident to regulation, and the Federal power to tax for revenue*. The income tax is exclusively a tax for revenue purposes, and cannot be upheld under the Federal regulatory powers, even though it affects a facility which might be subject to some degree of Federal regulatory power. When the taxing power is exercised to regulate an object properly within the Federal regulatory power such taxation will be upheld. *Board of Trustees* v. *United States*, 289 U. S. 48; *National Bank of Little Rock* v. *United States*, 101 U. S. 1; *Veazie Bank* v. *Fenno*, 8 Wall. 533. However, when the purpose of the tax is procurement of revenues, the tax on a state instrumentality will not be upheld. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 586. This vital distinction was recently emphasized by this Court in *United States* v. *California*, 297 U. S. 175, 184. In that case the

State of California was attempting to avoid Federal regulatory power over a state belt line railroad. It urged that since it was immune from Federal taxation, it must also be held immune from regulation. The Court flatly rejected the analogy between the two Federal powers, in the following language:

> *"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating.* That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction of taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf* v. *Mitchell*, 269 U. S. 514, 522-524, 70 L. Ed. 384, 391, 392, 46 S. Ct. 172, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. * * * But there is no such limitation upon the plenary power to regulate commerce." (Italics ours.)

The result of Petitioner's contention is clear. The States would thereby be compelled to refrain from doing this necessary work and the Federal Government would have to undertake it at a cost greatly in excess of the imaginary tax loss, which Petitioner attempts to suggest.

The Government's whole line of argument upon this point ignores the dominant characteristic of American government, the very characteristic which gave rise to the immunity rule—the dual and *limited* sovereignty of *both* state and federal governments.

Clear thinking recognizes that these very *limitations* upon the sovereignty of our state and national governments gave rise to the doctrines established in *McCulloch* v. *Mary-*

land and *Collector* v. *Day*. The rule came into being for the very reason that the whole matter involves *limited sovereignties*—yet, the Petitioner argues that those very limitations negative the rule!

4. THE FUNCTIONS OF THE PORT AUTHORITY DO NOT CONSTITUTE A WITHDRAWAL OF ANY NORMAL SOURCES OF FEDERAL REVENUE.

Although the Government has now dropped the contention advanced below that a tax upon the Port Authority would not burden the two States, it still advances the argument that the Port Authority has lost its immunity because it comes into competition with some private corporations, such as ferry companies.

Thus, much is made of the fact that the Port Authority's bridges and tunnels compete with private ferries, and that they have decreased the revenues of such ferries (Pet., pp. 9, 10, 11; 12, 14, 23). But competition in itself does not alter the character of an otherwise governmental activity *and the Rogers and Brush cases in this Court point this out so specifically that it is unnecessary to argue it in this Court.* It should be noted, however, (R., 1198-1200, 1282, 1287), that the entire purpose of the two States in developing the Port is to increase and facilitate its commerce, and to make those contributions necessary to the health and welfare of its people. This necessarily forwards the general prosperity —*and so directly increases Federal tax returns.*

The argument of the Government in these cases gives no consideration whatsoever to the millions of dollars saved to New York shippers and the consuming public through the

work of the Port Authority. This public work by the States directly increases the sources, quantity and stability of Federal revenues. In short, the petitioner's argument that the decrease of ferry revenues results in a decrease of Federal taxes, is like an effort to prove that a business is losing money by showing its expense items—completely ignoring its returns.

The Government advances as a reason for granting the Writs that (Pet., p. 21):

> "A decision by this Court is necessary finally to put at rest a controversy which has plagued both the Federal Taxing Authorities and the Port Authority, and an answer to it is necessary to point the way to a disposition of the tax questions which are accumulating about the growing use by States of Commissions and Authorities, often interstate in nature, to perform functions analogous to those of the Port Authority."

No valid distinction can be made between direct State action and the action of States exercised through authorities or other municipal instrumentalities. This entire authority plan was one devised to secure the construction of public works by self-liquidating state or federal agencies to avoid tremendous tax burdens. The Port Authority led the way in this field. In the brief submitted to the Circuit Court of Appeals by the States of New York and New Jersey as *amici curiae,* they set forth the very real burdens that would be imposed upon their Treasuries if State authorities and commissions such as the Port Authority could be taxed by the Federal Government.[1] The two States pointed out in that

[1] For the information of the Court we have included in the appendix of this memorandum the summary of argument contained in this brief of the States of New York and New Jersey below.

brief that the Port Authority was created to carry on the States' projects *upon an assumption of tax immunity* as the instrumentality of the States. It was shown that the States had obligated themselves (Compact of 1921, Art. XV) to contribute $100,000 annually until such time as the Port Authority should become self-sustaining. Although such immediate objective has been reached, the imposition of a Federal tax upon the Port Authority, its income, bonds and the salaries of its employees, could easily impose upon the States the duty of resuming these annual payments In addition, the States have advanced $18,500,000. in aid of the port programs, to be repaid by the Port Authority. To quote from the States' brief submitted to the Circuit Court:

> "A tax burden which increases operating expenses would either indefinitely postpone, or else forever prevent, the fulfilment by the Port Authority of this contingent obligation. Furthermore, since the two States may direct the expenditure of any excess Port Authority revenues a Federal tax would reduce a potential source of state income. Finally the States hold in their Treasuries $17,444,000. of Port Authority bonds."

Actual fee title to the Holland Tunnel as we have pointed out, is held directly by the States of New York and New Jersey. The vital importance of this fact is that without the revenues from the Holland Tunnel, all of the other Port Authority projects would not even be self-sustaining (R. 167). *Were it not for the plan of unified operation in Port development the surplus revenues from the Holland Tunnel could be deposited directly in the Treasuries of the two States.*

Let there be no mistake here as to the real object of the Government in seeking these Writs. It is the definite purpose of the Government to challenge the immunity of the

bonds and revenues of the Port Authority, if they are successful (R. 932). Indeed, in their Petition here they make their purpose plain when they say (Pet. p. 23) "Certainly, the Port Authority * * * should not be granted a complete tax immunity". And again, they refer on page 24 of their Petition to a tax not only on the employees but upon the Port Authority itself. The fact is, that it has been admitted by the Under-Secretary of the Treasury that the taxation of salaries is a "game hardly worth the candle."[1]

The real purpose is to open up a wide source of *new* revenue to the Federal Government—regardless of its effect on the States and regardless of its ultimate effect on the Federal Government itself. In attempting to do so by the Writ sought here the Government mistakes its forum. As admitted by the Under-Secretary of the Treasury,[2] the immunity of State bonds from Federal taxation can be removed only by resort to constitutional amendment. Upon that same occasion, the Under-Secretary was quick to point out that such a constitutional amendment should be

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[1] Tax Magazine, December, 1937, page 700. At page 703 of the same article the Under-Secretary said: "*Nevertheless, the Treasury in recent years has advocated the constitutional amendment rather than the statutory method of change, primarily to remove any doubt of the validity of the proposed tax, when imposed, with the possible unsettlement of the bond market while the test cases were proceeding through the courts.*" (Italics ours.)

[2] Address to the Bar Association of the City of New York, February 8, 1938. Previously the Under Secretary advised the House Ways and Means Subcommittee, "Indeed in view of the importance of the various taxes in our national economy it is well that changes should not be made precipitately." Treasury Dept. Release, Jan. 15, 1938.

operative only *in futuro,* a result which cannot be achieved by the action of this Court.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

JULIUS HENRY COHEN,
Attorney for Respondents and
General Counsel for The Port of
New York Authority.

On the memorandum:

AUSTIN J. TOBIN,
DANIEL B. GOLDBERG.

February 18, 1938.

APPENDIX.

(For the information of the Court we append the "Summary of Argument" from the brief submitted in the Circuit Court below, as *amici curiae*, by the States of New York and New Jersey.)

Summary of Argument.

I. The States of New York and New Jersey are here in fulfillment of the pledge of their Compact of 1921 to carry on "faithful cooperation in the future planning and development of the port of New York." The relations of the two States were not always characterized by such cooperation. Prior to the Compact of 1921 the history of the two States records a succession of conflicts arising out of the existence of the boundary line separating them politically, but which in actual effect divided a district historically, commercially and economically one. These conflicts were partially resolved by the Treaty of 1834 but ultimately were settled by the amendment to that treaty creating The Port of New York Authority and known as the "Compact of 1921." The creation of the Port Authority by this compact went straight to the heart of these interstate differences—to the avoidance, by planned effort, of conflict in a great economically unified harbor area, divided by a political boundary line. It was an outstanding achievement in sovereign cooperation, covering that very type of governmental dispute over boundaries, trade preferences and trade routes which for want of cooperation today in the larger theatre of international affairs, endangers the peace of the whole world.

II. A tax upon the Port Authority would impose a direct monetary burden upon the States themselves. Your amici

created and financed the Port Authority to carry on state projects upon the natural assumption of tax immunity. *The Port Authority is the direct agent and trustee of the two states in the development of the port.* The two States by joint action can at any time dissolve the Port Authority and take over its properties directly. Indeed, the fee title to the Holland Tunnel still remains today in the two States. The States obligated themselves, furthermore (Compact of 1921, Article XV), to contribute $100,000 annually until such time as the Port Authority should become self-sustaining. Although such immediate objective has been reached, the imposition of the Federal tax burden could easily impose upon the States the duty of resuming these annual payments. Moreover the States have actually advanced $18,500,000 in aid of the Port Authority's construction program, to be repaid by the Port Authority. A tax burden which increases operating expenses would either indefinitely postpone, or else forever prevent, the fulfilment by the Port Authority of this contingent obligation. Furthermore, since the two States may direct the expenditure of any excess Port Authority revenues a Federal tax would reduce a potential source of state income. Finally, the States hold in their Treasuries $17,444,000 of Port Authority bonds.

A holding in favor of the Government here would tend to destroy the usefulness for all of the states of the Authority method of achieving results and would adversely affect the political subdivisions and municipal corporations of the states in the performance of what have heretofore been regarded as normal and vital governmental functions.

The welfare and prosperity of the people of the two States are entirely dependent upon the business of the Port of New York. In turn, that business is dependent upon the joint

planning, protection and sound development of the port's facilities. If that planning, protection and development jointly by the two States is to be hampered, then the Federal government, in the loss of tax revenues, will be among the first to feel its adverse effects.

III. Since the purpose and functions of the Port Authority establish its immunity, the salaries of its officers and employees must likewise be held to be immune. The States cannot be hampered or interfered with by the federal government in the choice of human instrumentalities. An officer or employee of government is a part of the government itself, has a continuity in and of government, and represents and stands in the place of government. Any attempt by another sovereign to tax that employee is a direct interference with his government's operations.

IV. As an instrument of the two States the Port Authority is closely integrated into our governmental machinery. It was created by treaty and clothed with the attributes of sovereignty.

V. The governmental character of the functions exercised by the Port Authority is established both from the purposes of its creation and the governmental character of its functions. In its fulfillment of these two tests, it meets in all respects the considerations found by this Court in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, and by the Supreme Court of the United States in *New York, ex rel. Rogers* v. *Graves,* 299 U. S. 401 and *Brush* v. *Commissioner,* 300 U. S. 352.

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